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Supreme Court of the United States

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; and NAGALINGAM JEYALINGAM,

Petitioners,

—v.—

JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; MADELEINE ALBRIGHT, as United States Secretary of State; and UNITED STATES DEPARTMENT OF STATE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The government, it its opposition, does not dispute that the statute upheld by the court below would commit a U.S. citizen to prison for up to ten years for sending a human rights textbook to the Kurdistan Workers' Party, even where the textbook was intended to be and was in fact used solely for lawful purposes. The Ninth Circuit's conclusion that such a statute survives constitutional scrutiny as applied to persons who seek to support only lawful, nonviolent activities conflicts with decisions of this Court and other courts of appeals. The government's attempt to explain away the conflicts only underscores the necessity for certiorari review.

The government contends that the decision below does not conflict with the long line of "guilt by association" cases culminating in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), because in its view those cases protect only association *per se*, and do not protect the provision of material support to political organizations Opp. at 12-13. But that view would eviscerate the right of association. If the right of association protected the NAACP's leaders but tolerated the imposition of associational liability on its donors, the NAACP would be no more. The right to associate without the right to contribute to one's association is as meaningless as the right to speak without the right to pay for one's printing press.

The government does not dispute that the Third Circuit in *In re Asbestos School Litigation*, 46 F.3d 1284, 1289-90 (3d Cir. 1994), expressly applied the *Claiborne Hardware* principle to the provision of monetary contributions. In the face of this direct conflict with the Ninth Circuit's refusal to extend *Claiborne Hardware* to monetary contributions, the only distinction the government proffers is that *Asbestos School Litigation* did not involve a *foreign* organization. Opp. at 14-15. But the "guilt by association" principle applied there

was created in cases examining the right to associate with the Communist Party, an organization which Congress had found to be a foreign-dominated terrorist organization.[1] And the Ninth Circuit's refusal to follow *Claiborne Hardware* turned only on the distinction between association and the provision of associational support, and did not rest on any putative foreign-domestic distinction. Pet. App. 5a-6a.

The government maintains that its authority to prohibit support of select disfavored *political groups* follows *a fortiori* from its authority to impose economic sanctions on foreign *nations*. Opp. at 13-14, 16-17. But that argument proves too much. If the authority to impose sanctions on other nations and the authority to prohibit support of political associations were coextensive, the government could have prohibited all transactions with the Communist Party As this Court has expressly recognized, there is a critical constitutional difference between sanctioning a nation, an act not targeted at association itself but which may have the incidental effect of limiting associational rights, and directly imposing sanctions on a political group, an act which directly targets the right of association. *See Regan v. Wald*, 468 U.S. 222, 241-42 (1984) (distinguishing permissible prohibition on travel to Cuba from unconstitutional prohibitions on travel by Communist Party members).

The government defends the court of appeals' application of the relaxed scrutiny reserved for content-neutral regulations by contending that the challenged statute neutrally targets the *conduct* of material support, rather than association itself. Opp. at 15-16. But that is plainly false. Under the statute, the

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[1] Congress explicitly found that the Communist Party was (1) foreign-dominated; (2) engaged in terrorism and sabotage with intent to forcibly overthrow the United States; and (3) posed a clear and present danger to our national security. 50 U.S.C. § 781 (West 1991) (repealed 1993).

conduct of material support is permitted if offered to a favored organization, and prohibited only when offered to disfavored associations. Thus, it is not the *conduct* of material support, but its *association* with proscribed groups, that triggers the criminal penalty. On the government's theory, a campaign finance law that selectively barred contributions only to the Republican Party would be content-neutral and subject only to relaxed scrutiny, because it would permit abstract association with Republicans and would prohibit only the conduct of monetary contributions.[2]

The government suggests that the statute is justified because support to a foreign terrorist organization will free up resources that can then be used for terrorist ends. As a theoretical economic matter, it is undeniable that much (though probably not all) support is fungible. But that is equally true of support for the Communist Party, the NAACP, the Democratic Party, or any other group that has engaged in both legal and illegal activity. If the truism that support is fungible guided constitutional law, there would be no prohibition on guilt by association; indeed, the government presented precisely that argument, without success, in seeking to justify its anti-Communism measures.[3] By the same token,

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[2] The government's contention that the statute is content-neutral because its prohibition applies "regardless of the provider's motive," Opp. at 16, rests on a misunderstanding of First Amendment jurisprudence. Content discrimination analysis looks not at the motive of the speaker or donor, but at the *government's* purpose in regulating. *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989). The hypothetical ban on contributions to Republicans noted in the text above would apply irrespective of the motives of the donors, but would not therefore be content-neutral, because the government's motive in singling out the Republican Party would be suspect. Where, as here, a statute selectively bans support only to particular political organizations, it is manifestly not content-neutral.

[3] Brief for the United States on Reargument at 8, *Scales v. United States*, 367 U.S. 203 (1961) (arguing that "specific intent" showing is unnecessary "on

under the fungibility theory, the Establishment Clause would prohibit any government support to religious organizations, even for their wholly secular activities, since that support would necessarily free up resources that could be used for sectarian activities. Here, too, the Court has consistently rejected that contention.[4] Moreover, even accepting the government's fungibility theory, the challenged statute is wholly irrational, for it permits the donation of unlimited amounts of highly fungible medicine to terrorist groups.[5]

Finally, the government simply does not confront petitioners' contention that the statute gives the Secretary of State unfettered discretion to blacklist disfavored foreign organizations. The government cites the statutory criteria for designation, but fails to point out that the critical criterion – that the group's activity "threatens the ... national security of the United States" – is in turn expanded by another provision of the statute, which defines "national security" to mean

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the principle that knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself").

[4] *See Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends"); *Mitchell v. Helms*, 120 S. Ct. 2530, 2588 (2000) (Souter, J., dissenting) ("we have never adopted the position that any benefit that flows to a religious school is impermissible because it frees up resources for the school to engage in religious indoctrination").

[5] The government's suggestion that domestic organizations may be different because their books can be monitored misses the point, because no amount of monitoring responds to the concern that money given for a group's lawful activities may allow that group to expend resources on illegal activities that it might otherwise have spent on lawful activities. The fungibility of money is not a bookkeeping matter, but an economic theory that applies irrespective of accounting method.

"national defense, foreign relations, or economic interests of the United States." 8 U.S.C. §1189(c)(2). Since the Secretary defines our foreign relations, this criterion is self-justifying and nonreviewable. *People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 1846 (2000). The government points to no other statute in our history giving an executive official such untrammeled discretion to blacklist political groups. Incantations of foreign affairs do not justify such unprecedented power to directly proscribe U.S. citizens' exercise of political rights.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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